



PROGRAM MATERIALS

Program #31149

June 4, 2021

Litigating in A Global Pandemic

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LITIGATING IN A GLOBAL PANDEMIC – AND BEYOND

CLE Materials

Celesq Attorney Education Center
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Federal System

- The Federal Judiciary does intend on investing in the improvement of Information Technology to improve the court system
- In a 2021 report, it cited the success of the PACER filing system and the success of implementing new courtroom technology for the presentation of evidence; this might suggest an openness to more virtual practices
- Federal judges have reflected a general openness and appreciation for virtual proceedings during the pandemic
- However, under the CARES act, the Federal Judiciary is set to end most electronic proceedings once the pandemic is declared over
- The current status of individual courts can be found here

New York

- During the pandemic, e-filing expanded to cover 95% of the court systems
 - E-filing through NYSCEF is currently authorized in 60 Supreme Courts, 54 Surrogate's Courts, the Court of Claims and the Appellate Division, and has also expanded to the high-volume New York City Housing Court
- Some courts implemented word limits for motion papers and required a concise summary statement to increase review efficiency
- NY civil courts launched a free online dispute resolution pilot program
 - General virtual alternative dispute resolution success rates were consistent with in-person rates in the last year
- Many of the court orders issued during the pandemic specifically indicate that they are temporary or are meant only to provide for the health and safety of the general public
- As mentioned above, Chief Justice DiFiore aims to continue using technological advancements to advance the court's efficiency
 - The Chief Justice expressed confidence in virtual proceedings insisting that they proved effective at resolving cases in "a convenient, timely and cost-effective manner."
 - She created a Commission to Reimagine the Future of New York Courts
 - Said to anticipate a "new and *better* normal" for NYS courts, characterized by increased reliance on videoconferencing and e-filing
 - She has yet to outline specifics

NY Report on Reimagining the Future of the Courts – Summary

- The report was released by The Commission to Reimagine the Future of New York’s Courts, which was created by Chief Judge Janet DiFiore to “examine regulatory, structural, technological, and other innovations and propose practical short and long-range reforms”
- The commission is generally concerned with implemented innovation while ensuring equal access to justice and elimination of bias
- The Working Group made several broad recommendations including that New York:
 - Look to partner with major internet and technology service providers to supply all NYS courtrooms with secure and reliable high-speed WiFi
 - Commission an expert analysis of the costs and benefits of implementing automated and/or remote transcription and translation services
 - Create a pilot program for streaming trial-level proceedings
 - Establish a committee to periodically review and summarize developments in handling new forms of evidence
 - Seek out an expert analysis of the ways in which artificial intelligence may be implemented to improve efficiency of the courts
 - Implement the Commission’s previously released virtual trial protocols manual of best practices
 - Begin requiring training programs for judges regarding new developments in technology and the legal issues associated with considering new forms of evidence
- There were also reports released on Appellate Practice and Regulatory innovation released in late 2020 and two reports released in February 2021 regarding Remote Judging and E-Filing

Florida

- During the COVID-19 pandemic, most in-person court proceedings were suspended
- Grand jury proceedings resumed in November 2020
- Courts are reopening, but according to Supreme Court Executive Orders issued in May 2021, judges must continue to take all necessary steps to support remote conduct of proceedings
 - “All rules of procedure, court orders, and opinions applicable to court proceedings that limit or prohibit the use of communication equipment for the remote conduct of proceedings shall remain suspended”

- Florida recently created a pilot program for online dispute resolution for small claims, civil traffic, and divorces not including children
 - Other “high-volume, low complexity” case types can also be resolved through the program with approval from the Supreme Court
- The Florida Bar President predicts that motion hearings and any procedure which can be resolved “in five minutes” will remain virtual into the future
- The Florida Bar Technology Committee released [a best practices guide](#) for remote proceedings which suggests that remote proceedings will continue
- The Florida Bar conducted a [survey](#) among 1300 practicing attorneys, finding most would prefer to conduct routine and non-evidentiary proceedings remotely, but not trials
- Florida’s Rules of Judicial Administration Committee proposed amendments which would permit the use of audio or audio-video technology upon the request of a party or in the court’s discretion for non-evidentiary proceedings,
 - The amendment will be subject to the Florida Supreme Court’s final approval
- Miami-Dade [County just created a kiosk](#) workstation for civilians without technological resources to use to participate in virtual proceedings and has expressed a willingness to add more if they see demand
- Florida’s courts are very backlogged, which might suggest a willingness to try new technological innovations to relieve the system

California

- California has been slow to adopt e-filing in the past, but during the pandemic the California Supreme Court amended their rules and mandated e-filing until further notice
 - It also required acceptance of virtual service on parties who were represented
- Senate Bill 1146 codified procedures for electronic service and remote depositions
 - The bill is set to expire when the pandemic is declared over, but it’s expected that even when no longer legally mandated, these procedures will remain in effect in the courts
- Two California Supreme Court Associate Justices (Leondra Kruger and Martin Jenkins) said that the courts have adjusted well to remote oral arguments and conferences and that procedures are not expected to return completely to those used prior to the pandemic
- The California courts are also backlogged, suggesting a possible willingness to experiment with new technology in litigation

Texas

- Generally, Texas courts are now permitted to meet in person so long as minimum health and safety standards are in play, but should continue to use reasonable efforts to conduct proceedings remotely
- All courts in Texas are permitted to consider as evidence statements given outside of court or given remotely via videoconference
- If good cause is shown, courts must permit a participant to be involved in a proceeding remotely as opposed to in-person
- The Supreme Court of Texas' Emergency Order 36 was issued March 5, 2021 and removed the requirement that most proceedings be remote, but encouraged remote trials/hearings;
 - It also lifted the prohibition on in-person municipal and justice court proceedings, but continued to allow electronic proceedings
- An order permitting remote depositions (with reasonable prior written notice) was extended through June 1, 2021
- An El Paso judge said that virtual hearings have been so efficient that they will likely continue after the pandemic

Illinois

- As a result of the pandemic, E-filing was mandatory in Illinois with limited exceptions
- The Illinois Supreme Court held oral arguments via Zoom
- Remote depositions are permitted through telephone or video, but are subject to objection
- The Illinois Supreme Court did not completely close circuit courts, but entered orders to minimize the effects of the pandemic
 - Courts were mandated to continue to hear essential matters, and to do so remotely where feasible and within constitutional limits
 - Circuit and Appellate courts were permitted to consider as evidence sworn statements made outside of court
- The Illinois Supreme Court began discussing reopening in May 2020; their reopening guidelines did acknowledge the “culture shift in the effective use of video conference technology and remote work capacity,” and briefly mentioned the administrative office of the Illinois courts [was] exploring various options for enhanced statewide support of video conferencing and other remote technology.”

The Future of Arbitration

FINRA

- Parties can currently participate in in person arbitration so long as they all agree to do so and comply with all applicable state and local orders
- According to a recent podcast by FINRA, Zoom arbitration will likely continue into the future
- Parties will likely have the option to discuss and agree amongst themselves whether they would like to arbitrate in person or via Zoom; convenience and cost savings will likely affect their choices
- FINRA employees predict that the future of arbitration will present a hybrid model where larger cases are likely to meet in person, but smaller cases will opt for virtual arbitration due to the cost savings involved
- Pre-hearing conferences may be conducted via Zoom instead of through telephone
- After surveying its arbitrators, FINRA found that they reacted positively to Zoom hearings and would like to continue using them

JAMS

- JAMS has been offering virtual videoconferences and conference calls throughout the pandemic
- JAMS published an article on their blog asserting that virtual hearings and mediations proved so successful that they will be a permanent fixture of their business model
 - The posts' author, Honorable Patrick J. Mahoney, argued that in some cases, in-person interaction may be vital, as individuals need to converse casually, be able to judge credibility, and observe interactions between counsel and client; however, he believes that in the large majority of matters, virtual arbitration is superior

AAA

- In-Person hearing rooms are now open in select cities and states with openings dependent on local health and safety guidelines
- Virtual hearings have always been offered as an option by the AAA, but their use expanded greatly during the pandemic
- The AAA insists there is a “clear potential for a hybrid form of arbitration or mediation to continue in the future, even when hearing room access is” no longer restricted